THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MONICA FENTON,	)	OEA Matter No. 1601-0013-05
Employee	)	
	)	Date of Issuance: April 3, 2009
	)	
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Monica Fenton ("Employee") worked as a special education teacher assistant with D.C. Public Schools ("Agency"). Around April 3, 2003, Agency claimed that Employee threw keys at a student which resulted in two scratches on his back. The student was referred to the school nurse who provided medical attention to his injuries. Consequently, on August 5, 2003, Agency issued a notice of termination against Employee. The notice provided that Employee was terminated for violating the District of Columbia Municipal Regulations ("DCMR"), Title 5, Chapter 24, Section 2403.1.[1]

[1] This section states that ". . . corporal punishment is defined as the use, or attempted use, of physical force upon, or against, a student, either intentionally or with reckless disregard for the student's safety, as a punishment, or discipline." Section 2403.2 goes on to provide that "the use of corporal punishment in any form is strictly prohibited in and during all aspects of the public school environment or school activities. No student shall be subject to the infliction of corporal punishment by any teacher, other student, administrator, or other school personnel." *See* OEA Hearing Transcript, Agency Exhibit 1A (December 15, 2005).

On December 20, 2004, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). She argued that she never admitted to the corporal punishment allegation. She also argued that her Due Process rights were violated and that the investigation done by Agency was improperly conducted. Therefore, she requested that she be reinstated to her position with back pay and benefits.[2]

Agency filed its response to Employee's Petition for Appeal on February 7, 2005. It provided that Employee's rights were not violated and the allegations in her petition are without merit. Therefore, its action against Employee should be upheld.[3]

After conducting a three-day hearing, the OEA Administrative Judge ("AJ") issued his Initial Decision in this matter. He found that although Employee never admitted, during the hearing, that she threw keys at the student, she did testify that she physically restrained him. This action was inappropriate given that the student was only using improper language and was not physically aggressive toward Employee or others. The AJ concluded that the physical contact, especially throwing keys at the student, was not appropriate and warranted Employee's termination.[4] He further held that Employee knew or should have known that termination was the penalty for such misconduct because she signed a memorandum from the superintendent which highlighted the prohibition of inflicting corporal punishment. The AJ finally found that termination was an appropriate penalty given the circumstances of the case. Therefore,

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[2] *Petition for Appeal,* p. 4-6 (December 20, 2004).
[3] *Agency's Response to Employee's Petition for Appeal,* p. 2 (February 7, 2005).
[4] The AJ relied on testimony and evidence presented during the hearing to determine that Employee did throw the keys at the student.

he upheld Employee's termination.[5]

On November 13, 2006, Employee filed a Petition for Review with the OEA Board. She asserted that the Initial Decision did not address all material issues of law and fact that were raised in her Petition for Appeal. She stated that there were some discrepancies in testimonies provided by some of the witnesses during the hearing. Consequently, she requested that she be reinstated to her position with back pay and benefits.[6]

Agency supplied its answer to Employee's Petition for Review on December 15, 2006. It argued that Employee's Petition for Review was not based on any of the grounds for review that are outlined in OEA Rule 634.3. Agency stated that Employee's termination was upheld twice, and her Petition for Review should not be granted.[7]

The Court of Appeals in *D.C. Metropolitan Police Department v. Elton Pinkard*, 801 A.2d 86 (D.C. 2002) gave OEA limited review of an agency's decision to terminate an employee. The Court reasoned that OEA could only determine whether the agency's decision was supported by substantial evidence; whether there was harmful procedural error; or whether the decision was in accordance with the law or applicable regulations. Based on our review of the record, we believe that the AJ properly upheld Employee's termination.

Agency's decision to terminate Employee was based on substantial evidence. The AJ found the assistant principal's testimony that Employee threw keys at the student to be

[5] *Initial Decision,* p. 14-17 (October 2, 2006).
[6] *Petition for Review*, p. 1-3 (November 13, 2006).
[7] *Agency's Answer to Employee's Petition for Review,* p. 2 (December 15, 2006).

very credible. Mr. Johnson said that without being prompted, Employee admitted to him that she threw her keys at the student because he was disrupting class. The AJ also considered testimony from the school nurse to be credible. Ms. Brogsdale provided that the student claimed that Employee threw a set of keys at him causing two small scratches on his back. The nurse observed the fresh, bleeding scratches and treated them. Therefore, Agency's decision that Employee violated the corporal punishment regulations was based on substantial evidence. Additionally, there appeared to be no procedural harmful error in Agency reaching its determination.[8]

This Board also believes that Agency's decision was based on the law and applicable regulations. Agency proved that Employee violated the DCMR, Title 5, Chapter 24, Section 2403.1, by throwing keys at the student and by physically restraining him. Agency also proved that Employee was aware that such action constituted corporal punishment and that termination was the penalty if she engaged in such action.[9]

In determining the appropriateness of Agency's penalty, OEA has heavily relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985). The factors that we must consider are whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency.

[8] It must be noted that Agency initially failed to properly inform Employee of her rights to appeal to OEA as a result of the adverse action taken against her. However, the AJ did not allow Agency to benefit from this error. He allowed Employee's Petition for Appeal to be submitted, and he considered the matter on its merits through an evidentiary hearing.

[9] *OEA Hearing Transcript,* Agency Exhibits 1A and 1B (December 15, 2005). Exhibit 1A outlines what constitutes corporal punishment, and Exhibit 1B provides a sheet signed by Employee which indicated that she read the memorandum regarding corporal punishment.

Termination was within the range of penalties outlined by Agency. It provided that 5 DCMR 1401 outlined the disciplinary action that could be taken against an employee found to have violated the corporal punishment regulation. Furthermore, the penalty of termination was based on a consideration of relevant factors by Agency.

This Board has consistently relied on the factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), to determine if relevant factors were considered by Agency.[10] In applying the *Douglas* factors to this case, we find several reasons to support Agency's decision to terminate Employee. The most important reason is that the nature and seriousness of Employee's actions against the student outweighs any mitigating factors such as Employee's work record or job-related tensions.

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[10] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

(1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
(3) the employee's past disciplinary record;
(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
(7) consistency of the penalty with any applicable agency table of penalties;
(8) the notoriety of the offense or its impact upon the reputation of the agency;
(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
(10) potential for the employee's rehabilitation;
(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Based on the aforementioned, this Board believes that there was no clear error in the judgment reached by Agency. Agency's decision to terminate Employee was legitimately invoked and properly exercised. Accordingly, we hereby deny Employee's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

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Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.